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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 643.

ALBERT THOMPSON,
Petitioner,

v.

KAWASAKI KISEN, K.K., ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Statement of the Case.

Suit was commenced by plaintiff longshoreman in the Massachusetts State Court and was removed to the United States District Court for the District of Massachusetts. Plaintiff sought recovery from defendant Kawasaki Kisen, K.K. (hereinafter "Kawasaki"), for personal injuries allegedly sustained while engaged in longshoring operations as an employee of Bay State Stevedoring Company (hereinafter "Bay State") on board a vessel owned by Kawasaki. After removal, Kawasaki filed a third-party complaint against Bay State, on which a final judgment has been entered granting Kawasaki indemnity from Bay State for all amounts Kawasaki is required to pay to plaintiff, and for fees and expenses incurred in defense of the suit brought by plaintiff. (Bay State appealed from this judgment, which appeal was dismissed.)

Question Presented.

In affirming a judgment for *plaintiff*, did the Court of Appeals err simply because plaintiff at trial testified over objection that he had received from an unidentified source varying weekly payments?

Argument.

The Supreme Court should refuse to grant a writ of certiorari for review of the judgment of the United States Court of Appeals for the First Circuit under Supreme Court Rule 19, for the following reasons:

(A) The court below has not departed from the accepted and usual course of judicial proceedings, nor sanctioned such a departure by the lower court so as to call for exercise of this Court's power of supervision; and

(B) The decision of the court below conflicts neither with applicable decisions of this Court, nor with a decision of another Court of Appeals.

A. No Review Required.

Plaintiff commenced his suit against Kawasaki in a Massachusetts state court, alleging negligence and unseaworthiness. The action did not arise "under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (a). *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354 (1959). The action was removed to the federal court exclusively on the basis of the amount in controversy and the diversity of the citizenship of the parties. 28 U.S.C. § 1332.

By Massachusetts law, evidence as to compensation payments is admissible, even when such payments have been specifically identified, and, more significantly, even if the

plaintiff is a government employee receiving compensation under a federal statute. *McElwain* v. *Capotosto,* 332 Mass. 1, 3 (1954). The trial court and the Court of Appeals routinely applied Federal Rule of Civil Procedure 43 (a), which plainly indicates that in a federal court, when there are conflicting evidentiary rules, "the statute or rule which favors the reception of the evidence governs . . ." Such application of the "accepted and usual course of judicial proceedings" does not require review by this Court. Supreme Court Rule 19 (1(b)).

B. No Conflict Between Circuits.

Plaintiff urges a supposed conflict between the decision in the case at bar and the decision of the Fifth Circuit in *A. H. Bull Steamship Co., Inc.,* v. *Ligon,* 285 F. 2d 936, 938 (5th Cir. 1960). There the trial court, as a matter of discretion, excluded evidence that a plaintiff longshoreman (whose post-injury earnings were in fact only $400 per year) was receiving from a collateral source payments which would cease if his annual income exceeded $1,200. The discretion of the trial court was upheld by the Court of Appeals, based on a review of applicable Texas authority, particularly *R. E. Dumas Milner Chevrolet Co.* v. *Morphis* (Tex. Civ. App.), 337 S.W. 2d 185 (1960). The Fifth Circuit stated that "there may be cases where evidence of this kind should be admitted." *A. H. Bull Steamship Co., Inc.,* v. *Ligon,* 285 F. 2d 936, at 938. Under these circumstances there is no conflict between circuits.

Plaintiff here relies on *Eichel* v. *New York Central Railroad Co.,* 375 U.S. 253 (1963). The Court of Appeals in the instant case properly distinguished *Eichel,* a suit brought under the Federal Employers' Liability Act, 45 U.S.C. § 51. In the case at bar the District Court's jurisdiction did not depend on a federal statute, but rather rested wholly on

diversity (and the amount in controversy). The procedure the trial court followed in admitting the evidence ensures that suits on similar subjects will be decided on identical evidence, whether they be tried in the Massachusetts courts or the federal courts (either originally or on removal).

Conclusion.

Respondent Kawasaki submits that there is no compelling reason for granting the petition for writ of certiorari and urges that plaintiff's petition be denied.

Respectfully submitted,

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